

**BEFORE THE APPEALS BOARD
FOR THE
KANSAS DIVISION OF WORKERS COMPENSATION**

STEVE B. ROGERS
Claimant

VS.

DILLON COMPANIES, INC.
Respondent
Self-Insured

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Docket No. 222,046

ORDER

Claimant appeals from an Award entered by Administrative Law Judge John D. Clark on March 15, 2000.

APPEARANCES

Paul V. Dugan, Jr., of Wichita, Kansas, appeared on behalf of claimant. Scott J. Mann of Hutchinson, Kansas, appeared on behalf of respondent, a qualified self-insured.

RECORD AND STIPULATIONS

The Appeals Board has considered the record and adopted the stipulations listed in the Award.

ISSUES

The Administrative Law Judge found claimant suffered a temporary injury only and denied permanent partial disability benefits. On appeal, claimant disputes that finding and contends he is entitled to permanent partial disability benefits. The nature and extent of claimant's disability is the only issue on appeal.

FINDINGS OF FACT AND CONCLUSIONS OF LAW

After reviewing the record and considering the arguments, the Appeals Board concludes the Award should be modified. The Board finds claimant is entitled to benefits for a 5 percent permanent partial disability.

Findings of Fact

1. On December 16, 1996, claimant was involved in an automobile accident while making deliveries as part of his duties for respondent. The vehicle he was driving was struck on the driver's side door by another vehicle when the driver of the other vehicle failed to yield the right-of-way at an intersection.

2. Claimant immediately experienced stiffness and soreness but did not seek medical attention that day. He returned to the employer and then took the remainder of the day off. Claimant then worked his regular job the next few days but experienced increasing pain in his neck and shoulders. Claimant asked for, but was not provided, medical care.

3. On December 18, 1996, claimant went on his own to Wesley Medical Center emergency room. Claimant was also seen at the orthopedic clinic of St. Francis campus of Via Christi on February 13, 1997, with complaints of right shoulder and neck pain. The notes from that visit mention that claimant also had occasional tingling of his fingers. Claimant received therapy and pain medication. Notes from therapy state claimant demonstrates numbness to hands, decreased range of motion, decreased strength in left upper extremity, and pain in the cervical region. The therapy consisted of electrical stimulation, postural exercise, strengthening exercise, and moist heat.

4. Claimant continued to work for respondent but respondent gradually reduced his hours. As of June 13, 1997, claimant resigned. Claimant thereafter went to work for Kings-X restaurant as a dishwasher and then, beginning November 1997, at Wal-Mart initially doing janitorial work and then security. Claimant remained an employee of Wal-Mart at the time of the regular hearing. Throughout this period, claimant also worked part-time in his own cleaning business, D & S cleaning. Claimant operated this janitorial business for approximately 15 years and then stopped in 1998 because it became too painful to perform the work.

5. On July 11, 1997, while at Kings-X, claimant injured his left elbow. Because of the restrictions recommended as result of this injury, respondent did not retain claimant. Claimant went to work for Wal-Mart and on March 31, 1998, claimant reported injury to his right shoulder and left elbow. This injury at Wal-Mart did not result from a specific incident. Claimant testified the symptoms simply became severe enough that he believed he needed additional medical attention.

6. After reporting problems to Wal-Mart, claimant received treatment from several physicians, including Dr. Mark S. Dobyns, Dr. Philip R. Mills, and Dr. Jane K. Drazek. During this treatment claimant underwent an MRI for both the right shoulder and the cervical spine. The MRI of the cervical spine revealed, according to testimony of both Dr. Mills and Dr. Murati, a herniated disk at C5-6 and bulging discs at two other levels.

7. On March 4, 1999, claimant settled his workers compensation claim against Kings-X. The settlement transcript reflects the settlement was for a scheduled injury to the left upper extremity. On March 17, 1999, claimant settled a claim against Wal-Mart. The transcript indicates this settlement is based on the report from Dr. Mills' rating claimant's impairment as 5 percent of the whole person. Dr. Mills' rating included 7 percent impairment to the right shoulder and 2 percent (amended from his earlier report rating this as an additional 1 percent) additional impairment to the left upper extremity. The reports also state Dr. Mills' opinion that claimant has no permanent impairment to the cervical spine resulting from the December 16, 1996, automobile accident while working for respondent.

8. On April 14, 1999, at the request of claimant's counsel, Dr. Pedro A. Murati examined claimant and evaluated his injuries. He rated the impairment for claimant's cervical injury as 25 percent of the whole person. He noted the MRI results and testified he found bilateral radiculopathy that he considered to be the result of either nerve impingement or nerve irritation. Dr. Murati opined that of the 25 percent, he would attribute 20 percent to the automobile accident while working for respondent and 5 percent to aggravation while working for Wal-Mart.

Dr. Murati also concluded claimant has a right rotator cuff strain and found an additional 4 percent impairment of the upper extremity due to this strain. He attributed 3 of the 4 percent to the accident with respondent and 1 percent to the work for Wal-Mart. Dr. Murati converted the 4 percent impairment of the upper extremity to 2 percent of the whole person.

9. Dr. Murati and Dr. Mills each acknowledged the possibility that his opinions should be adjusted depending upon the history of the injury and symptoms. Dr. Murati was asked a series of questions based on the assumption that Dr. Kneidel found normal reflexes in July 1998. Dr. Murati agreed that if this finding were accurate, the work at Wal-Mart would likely have caused a greater portion of claimant's cervical problems. Dr. Murati testified that he would, if claimant had normal reflexes in July 1998, reverse his apportionment of the impairment and assign only 5 percent to the automobile accident and 20 percent to the work at Wal-Mart.

Only a portion of Dr. Kneidel's records are in evidence. While they support the hypothetical questions asked by respondent's counsel, the reports from Dr. Mills and Dr. Murati otherwise indicate Dr. Kneidel ordered the MRI testing shortly after the findings of normal reflexes and recommended surgery for the cervical injury.

Dr. Mills testified, as his report stated, claimant's injury on December 16, 1996, while working for respondent, was a temporary injury only. But Dr. Mills acknowledges his conclusions are based on his understanding that claimant had minor ongoing symptoms after his automobile accident in December 1996. Dr. Mills emphasized that claimant reported his symptoms returned during his work for Wal-Mart. Dr. Mills does not, however,

give any explanation for the herniated disc. He testifies he does not have an opinion about when that occurred.

10. Claimant testified, and the Board finds, claimant did not have problems with his neck or shoulders before the automobile accident of December 16, 1996. Claimant testified, and the Board finds, that he had problems with his neck and shoulders from the date of the automobile accident forward.

Conclusions of Law

1. Claimant has the burden of proving the various conditions upon which his right to compensation depends. K.S.A. 1996 Supp. 44-501(a).

2. The Board concludes claimant has proven more probably than not he sustained permanent impairment of function from his accident of December 16, 1996, while working for respondent. The Board bases this conclusion on the testimony of claimant, opinions of Dr. Murati, and the results of the MRI testing. The Board believes claimant's testimony that he had cervical and shoulder problems from that date forward that he had not had before. Given that fact, Dr. Mills' opinion, assigning 0 percent disability to the December 16, 1996, accident, is not entitled to significant weight, as Dr. Mills' testimony recognizes.

The Board also does not, on the other hand, consider Dr. Murati's rating and apportionment of disability to be completely persuasive. Claimant continued to work his regular job after the automobile accident. He left the work for respondent because his hours were reduced, not because of his injury. He then worked as a dishwasher and continued, for a period, to do his janitorial business.

While the Board agrees claimant more probably than not had some permanent impairment from the automobile accident, the Board concludes the impairment was relatively minor. The Board concludes, as Dr. Murati testified based on assumptions about Dr. Kneidel's findings, that claimant sustained a 5 percent permanent partial impairment as a result of the automobile accident on December 16, 1996, while doing delivery work for respondent. This is for the cervical injury. The shoulder injury was settled as part of the claim against Wal-Mart and no award is made here for injury to the shoulder.

AWARD

WHEREFORE, it is the finding, decision, and order of the Appeals Board that the Award entered by Administrative Law Judge John D. Clark on March 15, 2000, should be, and the same is hereby, modified.

WHEREFORE AN AWARD OF COMPENSATION IS HEREBY MADE IN ACCORDANCE WITH THE ABOVE FINDINGS IN FAVOR of the claimant, Steve B.

Rogers, and against the respondent, Dillon Companies, Inc., a qualified self-insured, for an accidental injury which occurred December 16, 1996, and based upon an average weekly wage of \$287.02, 20.75 weeks at the rate of \$191.36 per week or \$3,970.72, for a 5% permanent partial disability, all of which is presently due and owing less amounts previously paid.

The Appeals Board also approves and adopts all other orders entered by the Award not inconsistent herewith.

IT IS SO ORDERED.

Dated this ____ day of July 2000.

BOARD MEMBER

BOARD MEMBER

BOARD MEMBER

c: Paul V. Dugan, Jr., Wichita, KS
Scott J. Mann, Hutchinson, KS
John D. Clark, Administrative Law Judge
Philip S. Harness, Director